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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1339

JEROME S. SPEVACK, *Petitioner*,

v.

J. WILLIAM PIKE, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argument in Opposition to Petitioner's Reasons for Granting the Writ

In the first place it is to be pointed out that Petitioner Spevack's statement of the questions presented and the reasons for granting the present writ are much the same as those given in the Petition for a Writ of Certiorari, identified as No. 1199 in the October Term, 1964, of this Court. In the proceedings leading up to that petition for certiorari, Spevack had failed to appear, himself, and oppose Pike's petition for access to the impounded record in *Spevack* v. *Strauss et al.*,

Civil Action No. 880-57, in spite of the fact that his patent attorney, Joseph Y. Houghton, was served with a copy of the petition for access to afford him this opportunity.

When this Court refused to grant certiorari, Spevack moved to intervene in his own behalf and this motion was granted by the District Court. The District Court, however, again granted the petition for access and the present petition for certiorari has resulted from the affirming of the lower court's ruling by the Court of Appeals. It is believed that this Court should deny the present petition for writ of certiorari as it did the earlier petition.

Petitioner assigns six reasons for his belief that this Court should grant his petition for a writ of certiorari in the present case. These reasons are set forth as follows:

> "1. The writ should be granted to review and correct the failure of the courts below to follow and respect in this matter the 1959 mandate of this court in Spevack v. Strauss, et al., supra, as did Judge Letts' 1959 order entered pursuant thereto.
>
> "2. The writ should be granted because the plaintiff 'real party in interest' is not before the court.
>
> "3. The writ should be granted to review and correct the failure of the District Court and Court of Appeals to dismiss respondent Pike's petition for access for want of jurisdiction under Article III, Section 2 of the Constitution of the United States and under the laws and rules of Civil Procedure enacted pursuant to the Constitution.
>
> "4. The writ should be granted to review and correct the violation of principles of Equity Jurisprudence recognized by this Court in its 1959 Mandate in Spevack v. Strauss, supra.

"5. The writ should be granted because this matter presents a question of importance to the community at large, as to whether orders of this Court will be respected by the lower courts, and a conflict of decision with respect thereto.

"6. The writ should be granted because the deimpoundment, even now, could be harmful to Spevack, and would frustrate the efforts of this Court to shield him from any further damage than has already been done him and would be inequitable."

It is contended that these reasons are collectively and individually without merit and that the petition for a writ of certiorari should be refused. The Petitioner's first reason in support of the granting of the writ is highly technical in nature, as has been the case with the great majority of his pleadings and arguments from the outset, and amounts to nothing more than an exercise in semantics. It is the Petitioner's position that this Court's 1959 Per Curiam opinion, set forth in full at pages 3a and 4a of Petitioner's Appendix, requires that the record in the lower court remain impounded. This is based on the Court's statement that upon the fulfillment of either of two conditions previously set forth, "the proceedings heretofore had in the two lower courts are vacated."

It is submitted that this Court says no more than that regardless of whether the District Court dismisses the complaint as moot because Petitioner has caused his patent to issue, or whether the District Court, if Petitioner has failed to effect the issuance of his patent by duly paying the normal fee, dismisses the complaint on the ground that the extraordinary relief of an injunction would not then be warranted, the effect is the same in either case in that all of the proceedings had heretofore become meaningless and hence are annulled.

This was by no means an order that the record in the District Court remain impounded, and it is believed that this Court would have expressly stated that the record was to remain impounded, if it had wanted to include this as a part of its order. It is contended that the Petitioner's interpretation of the decision in Spevack v. Strauss et al. is most inconsistent with the fact that the Respondent here was granted free access to the briefs filed during the proceedings in this Court, which briefs show that affidavits are in existence detailing what has been done by the Atomic Energy Commission in publishing the Spevack invention and revealing much as to their content.

It is true that in the final order signed by Judge Letts, a portion calling for deimpoundment of the record is struck out, but there is no indication as to why this was done. Insofar as it appears on the record, this might well have been because Judge Letts considered it superfluous in that the record was automatically deimpounded upon entering of the order.

In any event, it is Respondent's contention that the U. S. District Court for the District of Columbia has direct control over its records and that it is entirely a matter within the discretion of the Court whether the record in any particular action be impounded or not. This control is a continuing one and it is within the discretion of the Court to decide when and under what conditions a previously impounded record should be deimpounded.

There is no merit whatever to the second reason advanced in support of the granting of the petition for a writ of certiorari. Respondent is not suing anyone, but initiated the present matter by petitioning for access to the impounded record in Spevack v. Strauss

et al. This is by no means equivalent to bringing an action at law and a copy of the petition was served on the attorneys for the parties involved in the original suit merely in order that they would have an opportunity to show that they would be injured by the deimpoundment of the record, if such were the case.

The present Respondent has, however, made it clear from the outset that he was merely petitioning the Court to exercise its inherent discretionary power and deimpound a record which should have been deimpounded upon termination of the original suit. He has also made it clear from the outset that he does not believe that he has any more right to access to the impounded record than does any member of the public at large.

Reason number 3 is a perfect example of Petitioner's attempt to rely upon technicalities to defeat Respondent's petition for access to the impounded record where this is clearly not appropriate.

It is Respondent's position that every court has jurisdiction over its own records. If a court has within its discretionary powers the right to impound, for good cause shown, the record of a judicial proceeding, in the face of the recognized policy which dictates that wherever possible all such proceedings be completely open to public inspection, it certainly has the right, within this same power, to deimpound a previously impounded record if it is convinced that this is warranted by present circumstances.

It is submitted that it is perfectly proper for a member of the public to request that a court exercise its discretionary powers, as was done here. No statute is involved and certainly the Federal Rules of Civil

Procedure are not controlling in any way, since no civil action has been brought.

The cases of *Warren, Petitioner* v. *Arzt, Respondent*, S.D.N.Y. 1955, 18 F.R.D. 11; *In re Rackliffe's Estate* (1937), 366 Ill. 22, 7 N.E. 2d. 754; *In re Market Basket, Inc.*, W.D. Mo., 1954, 122 F. Supp. 321, cited by Petitioner are not seen to be pertinent, since in none of them was a court being asked to exercise its purely discretionary power to deimpound a record previously impounded.

Nor is it believed that anything of pertinence is presented by Petitioner's attempt to show that avenues other than petitioning for access were open to one seeking deimpoundment of a court record. It is believed that it was quite proper to ask the Court to deimpound the record of its own volition and within a proper exercise of its discretionary powers. The present Petitioner attempts to make something of the fact that Respondent does not name his client in the petition for access, but it will be seen that on page 3 of the present Respondent's brief as Appellee in the Court of Appeals, which portion of the brief is referred to by Petitioner on page 10 of the present petition, it is pointed out that in open court, Appellee named the French patent law firm of G. Beau deLomenie, Andre Armengaud and G. Houssard as his principal. As pointed out earlier, Respondent realized that he had no more right to gain access to the impounded record than any member of the public at large, and, accordingly, he made petition for access as an individual.

Reasons 4 and 5 given by the Petitioner for granting the writ may be treated together.

Insofar as the question of deimpoundment is based on the true merits of the situation, it is not seen, nor has it been shown, that Mr. Spevack will be in any way injured by the release of the record for public inspection. Petitioner contends in the first place that the material in the affidavits would not have the effect of invalidating any of Mr. Spevack's patents, but in the same breath speculatively says that the affidavits could result in considerable litigation and cause him much expense and harassment. Since Mr. Spevack is the patent owner, it is obvious that he would be the initiating party to any litigation and that he would not be "harassed" under any circumstance. If Petitioner means that there is something in the impounded material which would lead one to believe that a particular patent could safely be ignored, then it is in the public interest that such material be made available.

Moreover, it is believed to be obvious that the potential infringer, knowing from the briefs before the U. S. Supreme Court that the Atomic Energy Commission had asserted in the record of the District Court that it had previously published the invention, would not be any more apt to honor the patent than he would if he had been able to gain access to said record for the purposes of evaluation. If the impounded record becomes available, and one sued by Mr. Spevack attempted to employ it as a defense, Mr. Spevack would have full and ample opportunity to attack it on any proper ground.

Respondent is not concerned with the question of whether any action taken by the Atomic Energy Commission to publish Mr. Spevack's disclosure was right or wrong, but he does believe that he, or anyone else,

should have the right to determine the exact nature of this publication, assuming it is an accomplished fact.

As was pointed out earlier, the 1959 Per Curiam opinion of this Court in Spevack v. Strauss et al. does not show, as contended by Petitioner, that Spevack is entitled to be protected against publication of the affidavits introduced into the record. The opinion does not represent any decision on the merits. It merely says that the restraining orders then in effect should be maintained until Spevack made their continuance moot by issuing his patent, or, if he failed to do this, his complaint should be dismissed on the ground that the granting of an injunction would not then be appropriate. This is certainly no ruling that there should be suppressed the knowledge of acts committed by the Atomic Energy Commission *before* the restraining orders were entered.

Accordingly, the granting of the petition for access does not represent a refusal by the District Court to respect the orders of this Court. Moreover, since there was no express decision by Judge Letts that the impoundment of the record be continued then or in the future, the granting of the petition for access does not represent a conflict in the decisions of the District Court.

It is believed to be apparent that Reason 6 given for granting the writ is without merit, since it is based on the assumption, felt to be incorrect, that it is the intention of this Court to "shield" Mr. Spevack from any further damage than has already been done him. In the appeal of *Spevack* v. *Strauss et al, supra,* this Court continued the restraining orders and impoundment in effect to prevent any disclosure of Spevack's invention between the time of commencement of the

action in the Court below and the issuance of his U. S. patent, which constitutes a complete disclosure of the invention, but Respondent here can find no indication in the Per Curiam opinion (appendix 3a and 4a) that this Court evidenced any desire to suppress or conceal what may have been done to disclose the invention *prior* to commencement of the action below.

As stated earlier, Respondent believes that he, or anyone else, should have the right to inspect the record, now impounded, to determine what was *actually* done to publish the invention *before* the restraining orders were entered.

CONCLUSION

The petition for a writ of certiorari should be refused.

Respectfully submitted,

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